

**EXPLANATORY MEMORANDUM TO  
THE NATIONAL ASSEMBLY FOR WALES (LEGISLATIVE  
COMPETENCE) (AMENDMENT OF SCHEDULE 7 TO THE  
GOVERNMENT OF WALES ACT 2006) ORDER 2007**

**2007 No. 2143**

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. **Description**

This instrument makes amendments to Schedule 7 to the Government of Wales Act 2006 (“the Act”), which sets out the subjects in relation to which the National Assembly for Wales (“the Assembly”) would be able to legislate if it were given the power to pass Acts of the Assembly.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None.

4. **Legislative Background**

- 4.1 The Act provides for a separate National Assembly for Wales (the legislature) and Welsh Assembly Government (the executive). Following the appointment of the new First Minister for Wales in May 2007, the new Assembly has the power to pass legislation known as Assembly Measures, while the Welsh Ministers have executive functions, including powers to make subordinate legislation.
- 4.2 Under the arrangements currently in force, the Assembly may pass Measures in relation to specified subject matters within the devolved fields listed in Schedule 5 to the Act. Orders in Council can be made under Part 3 of the Act specifying the matters in relation to which the Assembly will have these enhanced legislative powers.
- 4.3 However, the Act also provides for the situation in which, subject to endorsement by a referendum, the Assembly would acquire primary legislative powers. Under Part 4 of the Act, the Assembly would be able to pass Acts of the Assembly in relation to the subjects listed in Schedule 7.
- 4.4 Section 108 of the Act specifies the circumstances in which a provision in an Act of the Assembly would be within the Assembly’s legislative competence. Under section 108(4)(a), an Act must relate to one or more of the subjects listed in Part 1 of Schedule 7, and must not fall within any of the exceptions listed in Part 1 of Schedule 7. The question of whether a provision of an Assembly Act relates to a subject or falls within an exception is to be determined by reference to its purpose; see section

108(7). In addition, under section 108(6)(a), an Act must not breach any of the general restrictions on the Assembly's legislative competence set out in Part 2 of Schedule 7.

- 4.5 Section 109(1) of the Act provides that an Order in Council may amend Schedule 7, and this Order makes amendments to the list of subjects and exceptions set out in Part 1 of the Schedule. By virtue of section 109(4), the first Order in Council under section 109 must be approved by resolution of both Houses of Parliament, whereas subsequent Orders must also be approved by the Assembly. This is the first Order to be made under section 109, so the approval of the Assembly is not required.

## 5. **Extent**

Although the instrument extends to the whole of the United Kingdom, its practical application is limited to Wales as it amends provisions which will define the scope of the new Assembly's legislative competence.

## 6. **European Convention on Human Rights**

Nick Ainger, Parliamentary Under Secretary of State for Wales, has made the following statement:

“In my view the provisions of the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2007 are compatible with the Convention rights.”

## 7. **Policy background**

- 7.1 The Act makes provision for the enhancement of the Assembly's legislative powers, including the transfer of primary legislative powers over devolved matters direct to the Assembly. In the future, the additional legislative powers contained in Part 3 of the Act may prove to be insufficient to address the Assembly's needs and therefore the possibility of providing the Assembly with further enhanced law-making powers is available
- 7.2 The transfer of primary legislative powers can only take place following endorsement in a referendum under the provisions of Part 4 of the Act. A referendum will only take place if the Secretary of State presents a draft Order in Council which secures the approval of both Houses of Parliament and a two-thirds majority of the Assembly. The Government has no current plans for such a referendum.
- 7.3 The purpose of Part 1 of Schedule 7 is to define the subjects in relation to which the Assembly would be able to pass Acts (i.e. its primary legislative competence), in the event of a successful referendum. These subjects are intended to reflect the extent of the current executive functions of the Welsh Ministers. The headings in Schedule 7 do not have any legal significance, being merely aids to organising the subjects; therefore both

the subjects and the exceptions to those subjects apply across the whole Schedule. If a subject is not listed, it is not within the Assembly's primary legislative competence. Where a subject could reasonably be construed as enabling the Assembly to legislate on matters which are not devolved, express exceptions to those subjects have been included. In some cases, there are qualifications to the exceptions in order to make the scope of the exceptions clear.

- 7.4 The amendments to Schedule 7 made by this Order do not represent any significant alteration to the scope of the primary powers which the Assembly would acquire in the event of a referendum: they are technical amendments in order better to reflect the current extent of devolved subjects. During the Parliamentary debates on the Government of Wales Bill, the Secretary of State for Wales gave an undertaking to bring forward such an Order, in order to ensure that Schedule 7 is complete and accurate at this time (Col 193 Official Report 18 July 2006).

*Agriculture, fisheries, forestry and rural development*

- 7.5 As 'fish health' has been identified separately from 'animal health' as a subject in paragraph 1 of Schedule 7, it is appropriate for it to be similarly separately identified in the exclusions from the exceptions listed under this heading. As similar wording is used in the exceptions for motor vehicles, shipping and aviation in the *Highways and transport* heading, these exceptions are also amended to ensure consistency of wording throughout the Schedule.

*Economic development*

- 7.6 Functions in relation to pensions (including associated benefits) and energy are not devolved. The Order inserts exceptions under the *Economic development* heading to make it clear that the Assembly would not be able to pass Acts about pensions or nuclear power. The Order also removes the words 'apart from pollution' from the exceptions for oil and gas, and electricity: the Assembly will still have legislative competence in relation to pollution by virtue of paragraph 6 of Schedule 7.

*Environment*

- 7.7 'Burial and cremations' is listed in Schedule 7 as being within the Assembly's primary legislative competence. However, as responsibility for coroners' functions is not devolved, the Order excludes these from the subject, bringing it into line with the existing devolution position.

*Highways and transport*

- 7.8 The Order amends the incorrect citation of an EC Regulation in the rail exception. The exception relating to harbours etc is amended to ensure consistency of wording with paragraph 1 and to provide a more accurate description of the harbours for which executive responsibility is devolved.
- 7.9 Transport security across all modes of travel (not just the railways) is not a devolved subject, and the current exception relating to rail transport security is amended to clarify this. In addition, the Welsh Ministers do

not currently exercise any devolved functions in respect of the registration of local bus services, therefore, the Schedule is amended to include an express exception to that effect.

#### *Housing*

- 7.10 The subject ‘housing finance’ is amended to clarify that housing benefit and council tax benefits are not included.

#### *Public Administration*

- 7.11 The subject ‘Inquiries’ is amended to clarify that the Assembly would only be able to pass Acts about inquiries relating to devolved issues.

#### *Social welfare*

- 7.12 ‘Independent Living Funds’ and ‘Motability’ are added as express exceptions under Heading 15 to make it clear that these matters are not included.

#### *Town and country planning*

- 7.13 As ‘hazardous substances’ is listed as being within the Assembly’s primary legislative competence under the *Environment* heading, the duplicate reference in the *Town and country planning* heading is removed.

#### *Water and flood defence*

- 7.14 The wording of paragraph 19 of Schedule 7 is changed to more accurately reflect the current division of responsibilities between the UK Government and the Welsh Ministers and remove possible ambiguities in the current wording. The phrase ‘including reservoirs’ will be added to the ‘water resources management’ subject to clarify that the Assembly would be able to pass Acts in relation to reservoirs generally (including their construction, enlargement etc) not just in relation to reservoir safety. The safety of inland water (including canals) is not a matter that is currently devolved so this subject will be removed. All aspects of abstraction and impounding (not just that carried out by water/sewerage undertakers) are devolved matters and, as these are covered by the ‘water resources management’ subject, there is no need for a separate reference. The revised wording also would give the Assembly the power to pass Acts in relation to coast protection and the representation of consumers of sewerage services, both of which are matters in respect of which Welsh Ministers currently have executive competence. The amendments to the second exception reflect the fact that the regulation of licensed water suppliers is largely, though not entirely, a reserved matter. Similarly the addition of the word ‘regulation’ to the first exception reflects the current devolution settlement.

#### *Consultation*

- 7.15 There was no public consultation on the draft Order as it merely refines Schedule 7 to give effect to the policy underlying the Act. The Act gives effect to proposals contained in the White Paper “Better Governance for Wales” (Cm 6582, June 2005), which was the subject of full public

consultation. Relevant interested parties have been consulted about its provisions, including the Welsh Assembly Government and UK government departments.

## 8. **Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

## 9. **Contact**

Queries about the content of the instrument or this memorandum should be addressed to Paul Jones (Tel: 029 2089 8048 or email: [paul.jones@walesoffice.gsi.gov.uk](mailto:paul.jones@walesoffice.gsi.gov.uk)) or Sandie Green (Tel: 029 2089 8235 or email: [sandie.green@walesoffice.gsi.gov.uk](mailto:sandie.green@walesoffice.gsi.gov.uk)) at the Wales Office.

James George at the Wales Office (Tel: 020 7270 0552 or e-mail: [james.george@walesoffice.gsi.gov.uk](mailto:james.george@walesoffice.gsi.gov.uk)) can answer legal queries about the instrument.